

1 IN THE DISTRICT COURT OF THE UNITED STATES
2 FOR THE NORTHERN DISTRICT OF OHIO
3 EASTERN DIVISION

4 IN RE:
5 NATIONAL PRESCRIPTION
6 OPIATE LITIGATION

Case No. 1:17-MD-2804
Cleveland, Ohio

May 7, 2021
1:04 p.m.

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10 TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS

11 BEFORE THE HONORABLE DAN A. POLSTER,
12 UNITED STATES DISTRICT JUDGE, AND
13 DAVID A. RUIZ, UNITED STATES MAGISTRATE JUDGE.

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22
23 ALSO PRESENT: Special Master David Cohen

24 Proceedings recorded by mechanical stenography;
25 transcript produced by computer-aided transcription.

1 FRIDAY, MAY 7, 2021, 1:04 P.M.

2 THE COURT: All right. Dan Polster calling
3 in.

4 THE CLERK: Hi, Judge. I've made sure we
13:04:08 5 have everyone we need.

6 Do you want a roll call or should we just
7 go ahead?

8 THE COURT: No. No. I just want to make
9 sure everyone on my team is on.

13:04:17 10 THE CLERK: I have verified Carrie, Julian,
11 Scott, David Cohen, Judge Ruiz and the court reporter.

12 THE COURT: All right, fine.

13 All right.

14 THE CLERK: There's some buzzing and I've
13:04:28 15 asked that person to mute. I don't think they know
16 they're buzzing, but go ahead.

17 THE COURT: All right. Good afternoon,
18 everyone.

19 This is our monthly Track Three status
13:04:44 20 conference.

21 I've been obviously reviewing all the
22 filings in the last week about -- started by the
23 defendants' motion to strike.

24 I guess I'd like to know from the
13:04:59 25 plaintiffs when, when did you know that your -- your

1 case, your case had changed from implicating one million
2 prescriptions to implicating two million?

3 When did you know this?

4 MR. WEINBERGER: Judge, this is Pete
13:05:20 5 Weinberger.

6 I will address your question directly.

7 We knew it when we engaged in discovery
8 depositions, which began in, my recollection is, sometime
9 in February and ended sometime in March.

13:05:45 10 And what I -- you know, without rehashing
11 our opposition brief, what was revealed during the course
12 of that document discovery and deposition discovery was
13 red flag analysis policies information and how red flags
14 were or would be analyzed that were gleaned from a number
13:06:18 15 of different sources.

16 I cited to one of those sources, which is a
17 trade organization, the National Association of Chain
18 Drug Stores, which all the defendants belong to or
19 serve -- fund and serve on, which included information
13:06:40 20 about categories of red flags that were published,
21 discussed and ultimately decisions were made about in
22 2013.

23 And that was discovered and -- in document
24 production from the defendants and depositions were taken
13:07:11 25 about that, and I think from the document that you -- the

1 two documents that I attached to our opposition, you can
2 see how -- how it tracks the categories of red flags that
3 we have utilized, particularly with respect to the report
4 of our pharmacy expert Carmen Catizone.

13:07:37 5 In addition to that, our discovery
6 depositions revealed how the defendants themselves --
7 albeit very late in the timeline of this case --
8 developed their own written policies regarding red flag
9 analysis, and subsequently -- again late in the
13:08:06 10 timeline -- you know, implemented those red flags both
11 from the standpoint of addressing them through the
12 pharmacist, but also finally addressing them in terms of
13 how their own dispensing data, and an analysis of that
14 dispensing data and algorithms run on that dispensing
13:08:37 15 data, would be relevant to identifying red flags that
16 would be provided in terms of tools to their pharmacist
17 about prescriber history, prescriber profiles, and
18 patterns, patient patterns and profiles.

19 And general prescription patterns would
20 assist pharmacists based upon nation -- their own
21 nationwide data to address potential red flags associated
22 with individual prescriptions.

23 And then, thirdly -- and this is personally
24 revealed by the NACDS documents that I -- that I attached
13:09:30 25 to this opposition -- it reveals what the

1 defendants -- what discovery produced in this case
2 revealed regarding the defendants' knowledge of the
3 importance, breadth and criteria that should be used for
4 a red flag system based upon DEA enforcement actions and
13:10:05 5 other DEA publications published by the DEA in, for
6 example, the *Federal Register*.

7 So --

8 THE COURT: Well --

9 MR. WEINBERGER: That, so the timeline,
10 again, back to what I said initially, the timeline was
11 when we got into the intensive deposition and document
12 discovery that, you know, occurred about -- or culminated
13 or terminated about three or four weeks before we
14 produced the expert reports of Carmen Catizone and Craig
13:10:44 15 McCann.

16 THE COURT: All right. Look, it's not for
17 me to dictate or tell the plaintiffs what case to bring
18 or what case to try, and it's not for me to dictate how
19 the plaintiffs defend the plaintiffs' case.

20 That's -- that's up to all of you.

21 The case implicating one million --

22 MR. WEINBERGER: Judge, I'm sorry, at least
23 from my perspective, you are breaking up significantly.

24 THE COURT: I'm doing the best I can.

13:11:23 25 The case implicating one million

1 prescriptions is not the same as a case implicating two
2 million prescriptions, and there's no way that it's fair
3 for the plaintiffs to change their case at this late date
4 and not give the defendants a time -- time to, you know,
13:11:43 5 develop a defense.

6 So I'm not going to do that.

7 You know, I know the plaintiffs are saying
8 this case isn't about individual prescriptions, and it's
9 not, but the defendants have a right to know what
13:11:58 10 the -- what prescriptions the plaintiffs believe are
11 suspect and should have been, you know, kicked out,
12 monitored, flagged, whatever, by a valid system or at
13 least some checks, some inquiry.

14 And this is now a totally different case.

13:12:18 15 So --

16 MR. WEINBERGER: Can I -- I'm sorry, Your
17 Honor.

18 THE COURT: Go ahead.

19 MR. WEINBERGER: Can I respond? Can I
13:12:24 20 respond?

21 THE COURT: You can.

22 MR. WEINBERGER: So --

23 THE COURT: I've made my conclusion, but go
24 ahead.

13:12:28 25 MR. WEINBERGER: Well, I appreciate that,

1 Your Honor.

2 So what's -- what's -- what I've been
3 trying to communicate, perhaps not very well, is the fact
4 that, you know, we did what -- we did what we said we
13:12:45 5 would do. We identified, as best as we could, the
6 red -- the red flags that we thought were well-recognized
7 back in June of 2020, and we ran those red flags through
8 algorithms to -- onto the data and came up with the
9 problematic prescriptions.

13:13:15 10 What we didn't know was -- and the
11 defendants, you know, wouldn't agree, I mean fought us in
12 these conferences about what red flags really meant and,
13 you know, we formulated that answer as best we could at
14 the time that we had very limited information about what
13:13:44 15 we've later discovered.

16 And what we later discovered is exactly
17 what I've described, and that -- defendants knew very
18 well these categories are red flags.

19 And even with respect to the red flags that
13:14:07 20 we identified in 2000 -- in June of 2020, you know, these
21 sophisticated large Fortune 50 companies for the most
22 part, you know, would have had the ability -- and I'd be
23 surprised if they didn't do this themselves -- to run the
24 very -- and we gave them the code on the algorithms -- to
13:14:32 25 run the very algorithms against their own data.

1 So this is their data. This is, you know,
2 what the -- this is data that the CSA has required them
3 to maintain and utilize for as long as they've been
4 registrants.

13:14:50 5 So to suggest, Your Honor, that they
6 are -- that -- or for them to argue that they are
7 prejudiced because we've identified another batch of
8 prescriptions based upon the very red flag policies that
9 they ultimately came to, you know, in 2015 or '16 or '17
13:15:14 10 as opposed to 2006, '7 or '8 when they should have been
11 doing it, you know, I appreciate your concern that
12 they're claiming prejudice, but I'm having trouble
13 understanding where the true prejudice is.

14 So I appreciate the opportunity to respond
13:15:38 15 to your comments, Your Honor, and I'll just end there.

16 THE COURT: All right. Well, thank you.

17 MS. SWIFT: Your Honor, this is Kate --

18 THE COURT: All right. Now, I'm not
19 hearing.

13:15:59 20 I want to hear from the defendants why you
21 think the plaintiffs' case has changed and what
22 additional -- what -- what discovery -- you say you need
23 five, six months more discovery -- what you would do.
24 Again this is your data. I mean, what you would -- what
13:16:22 25 you would propose to do or redo in this five, six months.

1 MS. SWIFT: Your Honor, this is Kate Swift
2 for Walgreen's.

3 Can you hear me okay?

4 THE COURT: Yes. Yes, Kate.

13:16:33 5 MS. SWIFT: Thank you, Your Honor.

6 With respect to your question about what we
7 would do with the data, we would do the same thing we did
8 throughout fact discovery with the original one million
9 prescriptions the plaintiffs initially identified, which
13:16:47 10 was already an enormous number to address, which is to
11 say our data analysts would look at those flagged
12 prescriptions to determine whether they agreed that they
13 were applying the algorithms correctly. That even by
14 itself is a time-consuming effort.

13:17:14 15 Other experts spent an enormous amount of
16 time evaluating the criteria of the flags and individual
17 prescriptions that flagged onto those flags to determine
18 whether they agreed whether they were actually flagging
19 prescriptions that should have been flagged or not.

20 13:17:29 And we also spent a very large amount of
21 time discussing with our fact witnesses -- and conducting
22 other discovery in depositions and otherwise -- to
23 address what plaintiffs were calling red flags.

24 13:17:49 If I -- if I may also, please, respond to a
25 couple of the things that Mr. Weinberger said with

1 respect to why it took them so long to identify another
2 brand new one million prescriptions that were not
3 identified previously, he made basically two points.

4 One, and the two documents that are cited
13:18:09 5 in the plaintiffs' opposition briefs, those documents
6 relate to industry-wide discussions in the 2013 time
7 frame about proper controlled substances dispensing.
8 Those discussions involved Mr. Catizone, plaintiffs'
9 expert, his own organization, the National Association of
13:18:34 10 Boards of Pharmacy, and there's no reason at all to think
11 he didn't know. He participated in those discussions.

12 Secondly, Mr. Weinberger referred to the
13 pharmacy defendants' policies and procedures on flagging
14 prescriptions. Plaintiffs have had those policies for
13:18:49 15 years and, in fact, the very first time the parties
16 discussed the issue of an early disclosure of red flag
17 prescriptions in the December, 2019 status that the
18 defendants cited in the motion to strike, plaintiffs
19 cited a Walgreen's policy and said they were going to use
13:19:10 20 it to identify their red flags.

21 So we're having trouble understanding the
22 suggestion that this is new information.

23 In the reply brief that we filed this
24 morning, Your Honor, that's Document 3722, we laid all of
13:19:25 25 this out and also made the point that if the plaintiffs

1 are going to be allowed this very, very late new opinion
2 on a totally different new universe of red-flagged
3 prescriptions, they should be precluded from talking
4 about any of those prescriptions except the overlapping
13:19:46 5 ones, the 840,000 that were flagged both by their earlier
6 disclosure and the new untimely disclosure.

7 THE COURT: All right. Look, I -- I'm not
8 happy with any of this. I mean, I'm not happy with the
9 plaintiffs, and I'm not happy with the defendants. But
13:20:08 10 again it's not for me to tell the plaintiffs what case to
11 try or what you want to use or what theory or what
12 prescriptions you think are suspect.

13 Candidly, I thought, you know, a million
14 out of four million, roughly 25 percent, you know, to
13:20:27 15 convince the jury that the plaintiff -- the defendants
16 should have a system which would have identified 25
17 percent of the prescriptions given by doctors were
18 suspect was really stretching it.

19 Now you're saying they should have seen
20 that half the prescriptions were suspect, I think that's
21 a huge reach, but, you know, if you want to do it, you
22 want to do it.

23 But this is a -- this is a significantly
24 different case, and so I can't -- I'm not going -- I'm
13:21:00 25 not going to let you bring a case saying there are two

1 million suspicious prescriptions and do it in October.

2 So, I mean, the parties have got -- you've
3 got to -- plaintiffs have a choice. I mean, if
4 you -- you want to go back to the original one million,
13:21:21 5 you know, fine, you'll have to, you know, redo your
6 expert reports and you may have to move those dates a
7 little bit back, and so be it.

8 The defendants have offered another
9 possibility which, you know, you want to go with the
13:21:37 10 840,000 prescriptions that are identified both in the
11 June 20th, 2020 disclosure and the April, 2021, that's
12 fine, too.

13 But if you want to go forward with the two
14 million, you have that right, but we're not going to
13:21:54 15 trial in October. And candidly, I don't know when it
16 will be. I'm not going to try, you know, try and pull
17 off a complex jury trial in Cleveland in the winter, so
18 we're talking about spring; probably May.

19 All right? You know, I don't really care.
13:22:11 20 I'm getting frustrated with this whole pharmacy thing and
21 maybe, candidly, it's time to end the MDL with the
22 pharmacies.

23 I mean, I, you know, I don't understand
24 what the pharmacies are doing. I mean, if you want to
13:22:26 25 try thousands of these cases, fine.

1 I can understand why Walmart wants to
2 because everyone else will go bankrupt and they will be
3 the only, only pharmacy in the country, but again Walmart
4 has chosen to go to war with the Department of Justice,
13:22:39 5 and I think they should understand that if the Department
6 of Justice decides to suspend your DEA license, your
7 pharmacies are out of business.

8 So, you know, but whatever. So I've got
9 to -- you know, the plaintiffs, I'm going to give you a
13:22:58 10 very short period of time to decide what you want to do
11 because if I'm not going to trial in October, I've got a
12 ton of criminal trials that are backed up and I'll put
13 them in.

14 I did my first one in 14 months just this
13:23:11 15 week. I've got six, seven, eight, nine -- I've lost
16 count, and I've told a bunch of them they're not going to
17 get their trials until 2022, and I'm not happy about
18 that. So I'll put them in, if this trial gets kicked.

19 And at the same time, I want the
13:23:31 20 defendants -- I think I want you all to understand that
21 every other defendant in this MDL is at least making a
22 sincere effort to try and resolve these cases.

23 Whether they will or not remains to be
24 seen, but they're trying.

13:23:50 25 If the pharmacies don't, then there's

1 really no reason to have an MDL for the pharmacies. My
2 colleagues around the country can have all these cases
3 and, you know, try them until either the plaintiffs drop
4 or the pharmacies drop. They don't need me.

13:24:09 5 So I'm urging the pharmacies to take up my
6 offer to at least help you explore resolution, but, you
7 know, if you don't want to, that's up to you, but again I
8 don't -- this Track Three doesn't seem to be going
9 anywhere.

13:24:27 10 So I guess, Mr. Weinberger, what, you
11 know -- how much -- when can you make your decision? You
12 want to make a reasoned one and decide what you want to
13 do.

14 MR. WEINBERGER: Well, Your Honor, I think
13:24:49 15 we should -- today is Friday.

I think we can probably get back to you
with our decision by close of business on Wednesday.

18 That -- some of my colleagues that I have
19 to consult with are in the middle of the West Virginia
13:25:11 20 trial, and --

21 THE COURT: All right. Well, that's fine.
22 I mean, I was going to give you --

23 MR. WEINBERGER: Let -- go ahead.

24 THE COURT: Yes.

13:25:19 25 MR. WEINBERGER: Next Friday actually is

1 probably better. Next Friday.

2 THE COURT: Why don't you take -- why don't
3 you make it noon Friday, all right?

4 MR. WEINBERGER: Okay.

13:25:28 5 THE COURT: Make it noon. Noon. That's
6 the 14th. Take a week. It's an important decision and
7 you don't want to wing it, so talk to -- you know, again
8 you've got -- you've got three choices as I see it.

9 One, you -- you go back to your 4/20 -- I'm
13:25:51 10 sorry, June, 2020 --

11 MR. WEINBERGER: June, right.

12 THE COURT: -- disclosures and go with
13 that.

14 Option two is -- it's the defendants'
13:26:03 15 suggestion; it seems, you know, reasonable to me -- you
16 go with the 840,000 that's in the overlap between
17 8 -- between June, 2020 and April, 2021.

18 Or, three -- and in both one and two we
19 keep our October trial.

13:26:21 20 Or, number three, if you want to go with
21 the two million, then we postpone the trial until next
22 spring.

23 So you just need to let me and the
24 defendants know.

13:26:37 25 And then either way, I also want to discuss

1 this -- this idea of the field issue.

2 MR. WEINBERGER: The sampling.

3 THE COURT: All right. This is something
4 I've just become aware of recently.

13:27:00 5 I believe -- I believe that the sampling of
6 the notes field would be very probative to a jury. I
7 have no idea what it's going to show. I don't know if
8 it's going to help the plaintiffs. I don't know if it's
9 going to help the defendants. There may be pluses and
10 minuses for each.

11 But this would -- this would show, you
12 know, what due diligence the defendants did. All right?

13 Now, we're obviously not going to hold it
14 out for millions of prescriptions. If we have some
15 random sample, that seems fair. And I don't know what
16 the number is.

At the moment I don't know if the universe
is a million, 840,000, or two million.

It's got to be the same -- the universe of

1 the plaintiffs' case. So when we know what that universe
2 is, I'm going to order some sample.

3 Now, I mean, I'd like to hear from the
4 parties what you think a -- what a reasonable number is.

13:28:34 5 It's got to be reasonable in terms of, you know, that
6 someone's going to say it's enough, but it can't be so
7 much to be burden -- you know, unduly burdensome, both to
8 produce and analyze.

9 So what do you think a fair number is?

13:28:55 10 MR. WEINBERGER: So, Your Honor, this is
11 Pete again.

12 Thanks for bringing this issue before us,
13 because it is -- it is an important and pending issue.

14 First of all, I'm not sure to what extent
15 you're up-to-date, but the defendants have filed a motion
16 for reconsideration.

17 THE COURT: Yes, I'm cutting through all
18 this.

19 MR. WEINBERGER: Okay.

13:29:16 20 THE COURT: I'm cutting through all this.

21 This is me. This is not Special Master
22 Cohen. I'm ordering it because I think to a jury it
23 could be very probative. It will show -- I have no idea
24 what's in the -- what it's going to show.

13:29:32 25 I mean, it may be very helpful to the

1 defendants. If it shows that, you know, your pharmacists
2 were, you know, checking things out and noting down
3 whatever they check, that's what a conscientious
4 pharmacist should do. If they're all blank, well, then
13:29:49 5 that doesn't look so good.

6 MR. WEINBERGER: So let me answer your --

7 THE COURT: What is a fair number?

8 MR. WEINBERGER: Let me answer your
9 question directly.

13:29:57 10 So we have -- we have a concrete proposal
11 that we submitted to Special Master Cohen, and it asks or
12 it suggests that we identify 250 red-flagged
13 prescriptions per year per defendant from 2006 to 2019.

14 And we actually, in anticipation or because
13:30:27 15 of the motion to strike that was filed, we -- we actually
16 said "Let's run that against the 840,000 prescriptions
17 that were flagged both in June of 2020 and the additional
18 calculations arising from our expert's report."

19 So we've already -- we've already made our
13:30:52 20 proposal and we've also, on a technical matter, suggested
21 how it is that we do that random sampling, and there are
22 others much more technical than I that could describe it.

23 But it's in writing, Your Honor. It was
24 submitted to Special Master Cohen, and again it's 250
13:31:17 25 red-flagged prescriptions per year per defendant for the

1 13 years from 2006 to 2019.

2 THE COURT: All right. From the
3 defendants' standpoint, do you think that's -- I mean,
4 it's not -- that's not too -- that's not a lot.

13:31:32 5 Do you think it's too large? Do you think
6 it's too small? What do you think?

7 MR. DELINSKY: Your Honor, this is Eric.

8 THE COURT: Yeah.

9 MR. DELINSKY: And, Judge, I know you don't
10 want to hear it, but I would be remiss if I -- if I just
11 didn't state it at the outset -- and I won't devote time
12 to it -- that we do object to this line of discovery as
13 having been waived by plaintiffs, and it's late timing.

14 THE COURT: It --

13:32:03 15 MR. DELINSKY: It came up a year-and-a-half
16 ago and plaintiffs withdrew their request for it, so it
17 puts us in an extremely difficult posture, given the
18 burdens associated with culling this evidence.

19 But let me move on, Your Honor.

13:32:21 20 THE COURT: Why -- obviously, look, we're
21 not talking about -- I mean, it's a relatively small
22 number of documents, all right? I mean, 250 per year per
23 defendant times 13. Okay? It's -- each defendant,
24 that's 250 times 13, so we're talking about four or 5,000
25 documents.

1 MR. DELINSKY: Right.

2 THE COURT: Four or 5,000 documents.

3 MR. DELINSKY: Your Honor, for CVS it's
4 3,500, given the date range.

13:32:56 5 THE COURT: Okay.

6 MR. DELINSKY: And let me explain to you.
7 There's several complexities. Some are technological.
8 They hit different defendants in different ways. It's
9 just time-consuming, that's all.

13:33:06 10 But I want to focus your attention on one
11 part of this and that's the actual paper prescriptions
12 themselves because it has always been custom for many
13 pharmacists to take notes -- take their notes on the back
14 side usually of the prescriptions.

13:33:26 15 And while prescriptions are scanned in the
16 system, the back sides are not. It's only the front
17 sides.

18 So much of the burden, Your Honor, is
19 extracting, going back to 2006, these hard copies so that
20 the sample is complete. And so I'm most familiar with
21 CVS. Let me tell you what that would entail, Judge.

22 The documents are maintained in up to
23 different -- 15 different facilities. Those would be,
24 for recent years, our 14 pharmacies in Lake and Trumbull
13:34:05 25 County, and then for beyond the last few years to varying

1 degrees they are at Iron Mountain. They are in archived
2 storage.

3 It's hard to know for sure until we see the
4 actual prescriptions, but we anticipate that it could
13:34:24 5 require us to retrieve approximately 3,500 boxes, either
6 from the pharmacies themselves or from archived storage.

7 And then it's a manual review process. It
8 can't be done with computers. You know, a person has to
9 sit there and sort through the boxes to pull the
13:34:49 10 prescriptions. It's an extremely time-consuming exercise
11 to do that. It's not like, you know, running search
12 queries on e-mails. It's not electronic, Judge. It's --
13 Judge, it's different.

14 And so mindful that we do object to any of
13:35:11 15 this discovery, the issue for us to a large degree is
16 time and burden.

17 We put forth a proposal, and the proposal
18 when it follows the sample, 100 per defendant going back
19 five years.

13:35:35 20 The time component's important, Your Honor,
21 for a number of reasons.

22 The first reason is that obviously more
23 recent documents, there's a higher chance that they're
24 easier to collect and that we may not have to dip into
13:35:50 25 archival storage.

1 The second reason is that any suggestion
2 that pharmacists should document due diligence is a
3 relatively new creation, so by way of example,
4 plaintiffs' expert cites documents beginning in around
13:36:12 5 2012 indicating suggestions that this kind of work should
6 be reduced to paper.

7 So we think, given the time crunch and the
8 burdens, it should be a very small sample. And it really
9 should be limited to later years because, Your Honor,
13:36:34 10 it's obviously -- if nobody was talking about
11 documentation in, say, 2010 or 2008, that a pharmacist
12 didn't write something down obviously is not very
13 probative.

14 So we think it only makes sense to do it in
13:36:49 15 the recent years, and it needs to be small.

16 This all feeds into the trial date, Your
17 Honor, and we were working to an October trial date, what
18 we felt we could reasonably and fairly accomplish with an
19 October trial date.

13:37:05 20 Obviously, there's a degree of a sliding
21 scale.

22 And there's one other issue, Your Honor,
23 and I've already droned on too long, but there's one
24 other issue and that is that given that this is new
13:37:19 25 discovery and that we've gone from an aggregate

1 collection of prescriptions that we understood would be
2 assessed in the aggregate to a specific body, we are
3 entitled to and require the opportunity for some
4 responsive discovery based on what the sample shows.

13:37:40 5 We have that right, limited to that
6 universe of prescriptions, which we don't know yet, and
7 we need time for that, too.

8 So that's what's figured into our proposal
9 for 100. We were trying to come up with a number that we
13:37:55 10 felt we could accomplish before October, and where we
11 would get the right for fair reciprocal discovery on it.

12 THE COURT: All right. Well, I have a
13 little question here.

14 Again, I -- you know, my gut feeling is
13:38:21 15 that is five years may be a bit short and, you know, a
16 hundred may be a little, you know, a little low, but I,
17 you know, one of the --

18 MR. WEINBERGER: Your Honor, he's talking a
19 hundred -- he's talking a hundred per defendant; not a
13:38:41 20 hundred per year.

21 THE COURT: No, he's talking about a
22 hundred for each of five years.

23 MR. WEINBERGER: That's -- Your Honor --

24 MR. DELINSKY: I'm sorry if I was unclear,
13:38:51 25 Your Honor.

1 We -- our proposal, given the difficulty in
2 locating or the time-consuming nature of locating the
3 hard copies, among other difficulties, was 100 per
4 defendant.

13:39:03 5 THE COURT: Eric, that's 20 per year.
6 That's not meaningful.

7 There isn't any -- I mean, no one
8 would -- that's worthless. That's too small to be of
9 value at all.

13:39:16 10 MR. WEINBERGER: And, Your Honor --
11 THE COURT: That -- that's no good.

12 The --

13 MR. DELINSKY: The complexity, Your
14 Honor -- I'm sorry, Peter.

13:39:28 15 MR. WEINBERGER: In terms of how far back,
16 you know, I do not agree to their interpretation of our
17 expert report.

18 And so, you know, the discovery time frame
19 for this case with respect to SOMS and with respect to
20 the distribution case and with respect to the dispensing
21 case has always been back to 2006.

22 And then just one other point. An
23 important part of the corresponding responsibility of the
24 pharmacist to review a prescription for red flags --
13:40:12 25 which has been the law since the beginning of the CSA in

1 1971, Your Honor, and which the DEA representatives in
2 this case have testified is where the red flag
3 investigation comes in in terms of their fulfilling their
4 corresponding responsibility -- the documentation of that
13:40:42 5 is extremely important because when a pharmacist gets a
6 prescription that's flagged, and clears that prescription
7 based upon some investigation that was done -- they call
8 the physician, they look at other prescriptions of that
9 physician, they do other investigations -- the
13:41:07 10 documentation for that ultimately becomes relevant the
11 next time that doctor -- doctor's prescription gets
12 presented for another patient or that same patient
13 presents another prescription, either written by that
14 same doctor or by a different doctor.

13:41:28 15 And so, you know, if the answer is, "Well,
16 we did -- we did document due diligence" -- and, by the
17 way, they say there's no limitation on that in terms of
18 time frame -- "and we wrote on the back of a hard copy
19 prescription and it ended up in a box somewhere," how
13:41:49 20 does a subsequent pharmacist for a subsequent
21 prescription, confronted potentially with a prescription
22 that they are flagging for some reason, get to the prior
23 information that was generated from the prior
24 prescription?

13:42:09 25 Now, part of it is -- because we took

1 30 (b) (6) depositions of their document and data
2 representatives, part of it is that there was some
3 documentation of due diligence within a computerized
4 system in that there were fields that could be -- where
13:42:33 5 you could create narrative notes. There were prescriber
6 fields, there were patient fields, et cetera.

7 And some of the information presumably that
8 would be written on the back of the prescription would
9 end up in these notes fields in the -- in the data
13:42:48 10 itself. But be that as it may, you know, we're
11 taking -- we're dealing with a representation that,
12 "Well, we scanned the front but we didn't scan the back
13 and so, therefore, you know, we have -- it's so
14 burdensome to pull these documents."

13:43:09 15 I mean, recognizing or giving them the
16 benefit of the doubt that that's true, that's why we came
17 up with the numbers that we did, which was, you know, a
18 very, very small fraction of the total prescriptions that
19 we've identified.

13:43:30 20 THE COURT: Well --

21 MR. DELINSKY: Your Honor, if I could just
22 make two quick points.

23 Number one -- and I think there's really
24 two critical ones here.

13:43:38 25 Number one is just time. Plaintiffs raised

1 this late. It originally was raised by them in January
2 of 2020, so roughly 18 months ago, and they decided at
3 that point to withdraw their request.

4 Then they --

13:43:53 5 MR. WEINBERGER: I'm sorry, we did not. We
6 did not. I'm sorry.

7 THE COURT: Look, I'm not -- I'm beyond
8 that.

9 I think it's --

13:43:59 10 MR. DELINSKY: Okay. Fair enough, Your
11 Honor.

12 THE COURT: I think a jury -- I mean, I
13 don't know -- the jury is going to have a hard time
14 following this, but I think a juror would find this very
15 relevant. It's firsthand evidence of what the
16 defendant -- what the pharmacist did. Okay?

17 I mean, you know, no one -- no one's
18 guessing. Here it is. If it's a statistical sample, all
19 right, it is what it is, and both sides can argue from
20 it.

21 MR. DELINSKY: Your Honor, I think the two
22 issues driving the defendants, given that and subject to
23 our objections, are, number one, time and fairness, which
24 is we have an October date.

13:44:41 25 THE COURT: All right.

1 MR. DELINSKY: And that makes this very
2 difficult and introduces real fairness issues, that's
3 number one.

4 And number two, Your Honor -- and this is
13:44:52 5 why I really would ask that we abide by the process we've
6 ordinarily gone through -- some of these issues that
7 Mr. Weinberger has raised and they are not ones that are
8 reduced to DEA guidance or Board of Pharmacy guidance,
9 and that's why I do believe -- we have a letter pending
13:45:19 10 before Special Master Cohen -- I would ask that we let
11 this unfold with a ruling by Special Master Cohen on a
12 reconsideration request. If there's objection, get them
13 to you promptly.

14 These are serious issues. The fairness
13:45:42 15 issues are significant. The timing issues are
16 significant, the burden issues.

17 This whole issue of documentation and is it
18 even fair to look at evidence before 2012 or 2013, that's
19 a very significant issue, too, especially with the burden
13:45:55 20 and the time issues.

21 So my request would be we let the process
22 unfold so that these issues can really be fleshed out and
23 be given -- sort of be addressed in writing and decided
24 in that fashion.

13:46:16 25 THE COURT: Well, I appreciate that, but I

1 don't think we have -- I have a limited amount of time.
2 The lawyers have a limited amount of time. I'm going to
3 order this, and the sooner it's done and everyone knows,
4 they can start working on it.

So this is what we're going to do.

I think we're going to have 10 years, 2010
to 2019. I don't think we need 2006, '7, '8 and '9. If
this doesn't show anything, you know, 2010 is far enough
back.

13:46:52 10 And I'm going to make it 200 prescriptions
11 per defendant per year for 10 years. All right. Again,
12 this is just a randomized sample.

13 All right. So it's 200 per defendant per
14 year for 10 years, 2010 to 2019.

13:47:14 15 Now, the only thing we have to -- we'll
16 have to wait for a week to know if the universe is the
17 original one million, what I'll call the hybrid 840,000,
18 or the new two million. That will be the universe.

19 And we've got to wait a week until the
13:47:38 20 plaintiffs make their election. But once we know that,
21 then that's where we will be. Whatever it shows, it
22 shows.

23 If we need to do a little more discovery on
24 that, you know, so be it.

I think it will be very probative to a

1 jury, whatever it shows, and I have no clue what it's
2 going to show. But that will be -- that's the decision.

13:48:07 5 The other issue that I think you should
6 address, as long as you're addressing everything, is
7 Eric's request for what he terms responsive discovery.
8 And I'm not really sure what that means.

9 THE COURT: I don't know what -- I don't
10 know what it is, but --

14 THE COURT: We're not going to -- you don't
13:48:30 15 need to depose doctors. Again, no one -- the issue is
16 not, you know, what the doctors ever did. It's what the
17 pharmacies did, at least what they documented. And it's
18 there or it's not there, so that's it.

19 Nothing that a doctor said or did is going
13:48:51 20 to be responsive to this.

21 MR. DELINSKY: Your Honor, this is a very
22 important point for us. It is a very important point.

23 We are now at a universe of 2,000
24 prescriptions. If you pull out any one of those, and
13:49:05 25 let's suppose hypothetically that it's riddled

1 with -- suppose we pull one of those prescriptions and it
2 has plaintiffs' red flags on its face and zero
3 documentation on it -- this is just a hypothetical,
4 Judge -- but it was written by a doctor at the Cleveland
13:49:52 5 Clinic, and that doctor were to testify, "All my
6 prescriptions, including that one, were written for a
7 legitimate medical purpose in the ordinary course of my
8 medical practice," in that case red flags are
9 superfluous. They're meaningful -- they're meaningless,
13:50:12 10 excuse me. Documentation is meaningless.

11 That script is out of the case. There can
12 be no liability for a prescription that was written by a
13 licensed doctor for a legitimate medical reason in the
14 ordinary course of her practice or his practice.

13:50:25 15 So we believe this is very responsive. If
16 each of those 2,000 prescriptions were supported by
17 testimony from the prescribing doctors -- and I
18 appreciate we couldn't depose all of them, even though
19 we'd like to, or anywhere near all of them -- but let's
13:50:44 20 suppose they were, all of those prescriptions, the red
21 flag issue becomes beside the point as a legal matter.

22 So we see this as central, necessary
23 discovery, essential to our defense.

24 And, Your Honor, you have been resolute
13:50:59 25 from the inception of the MDL that we get to meet

1 plaintiffs' evidence in the manner that we choose,
2 subject to the rules of admissibility. And there's no
3 doubt this would be admissible evidence. And this is a
4 really big, important issue to us. It goes, in our
13:51:20 5 opinion, to just the basic fairness if plaintiffs get to
6 discover new items of evidence, we get to take discovery
7 just as to those items, not beyond that, and the
8 discovery we take would be, among other things, of the
9 doctors who wrote them, whose names are affixed to them.

13:51:36 10 And we see this as a very significant
11 issue, Your Honor. I cannot understand it -- underestimate
12 it. And if there's any question about it, we'd ask for
13 the opportunity to brief this issue.

14 THE COURT: Wait a minute.

13:51:49 15 You're talking about, I mean, depose 2,000
16 doctors, you can depose a million doctors and presumably
17 most of these doctors -- I mean, Eric, I can't imagine
18 any doctor taking the stand and saying anything other
19 than what you just said about any of his or her
13:52:05 20 prescriptions.

21 Otherwise, they're going to lose their
22 medical license and probably be prosecuted.

23 MR. DELINSKY: And, Your Honor, I
24 think -- that is the fallacy of plaintiffs' case.

13:52:19 25 MR. WEINBERGER: No, it isn't. No, it

1 isn't, Your Honor.

2 THE COURT: Hold it.

3 MR. WEINBERGER: I'm sorry.

4 THE COURT: You don't need any depositions
13:52:25 5 for that.

6 The issue is there are certain
7 prescriptions, certain things that don't -- that look
8 strange, they look odd, they look like maybe those things
9 didn't happen.

10 So you should have a system to check them,
11 all right, and presumably each pharmacy had them.

12 If you had no system at all, this case is
13 going to be very simple. You could have every doctor
14 come in, parade every doctor in, it's not going to help
15 you.

16 The issue is what system did you have and
17 did you use it, and that's all this random sample is
18 going to show.

19 Who cares what --

20 MR. DELINSKY: But, Your Honor, that's
21 plaintiffs' theory of the case. That's plaintiffs'
22 presentation. It's not ours.

23 We are pursuing a defense that looks
24 different from that, and we're entitled to it, and you
13:53:13 25 have said all along we are.

1 And if we are not to get this discovery,
2 Your Honor, then we would ask that there be a jury
3 instruction that says "None of these 2,000 prescriptions
4 can be at issue as to whether or not they were written
13:53:33 5 for legitimate medical reasons. In fact, you need to
6 assume they were and this is just a sampling, you can
7 look at documentation practices."

8 But if we're not going to be able to
9 collect this discovery, these issues can't be in front of
13:53:46 10 the jury.

11 THE COURT: Wait a minute. Wait a minute.
12 The pharmacist didn't -- you know, if your
13 pharmacist talked to the doctor, that's going to be
14 on -- that's going to be in the field, in the notes.

13:54:02 15 MR. DELINSKY: Not necessarily, Your Honor.
16 And it's also beside the point, because our position is
17 if a script was written for a legitimate medical reason
18 by the doctor, the case is over for that script. It
19 matters not --

13:54:14 20 THE COURT: But you don't -- if you want to
21 just parade in a bunch of doctors from, you know, Lake
22 and Trumbull County to just say, you know, "I'm a good
23 doctor, and when I write a prescription it's for a valid
24 reason," I guess you can do that, just generally.
13:54:32 25 Doesn't matter what individual prescriptions are because

1 the plaintiffs -- the plaintiffs aren't saying that any
2 individual prescription is per se a bad one.

3 All right. So --

4 MR. DELINSKY: But, Your Honor, I believe
13:54:46 5 they are.

6 They have answered discovery requests --
7 and I could be corrected on this -- where they have now a
8 large universe of prescriptions as not having been
9 written for legitimate medical reasons so this is
13:54:59 10 squarely at issue. It would be at issue even if they
11 hadn't.

12 And we do believe that as to this universe,
13 it's a new universe, it's new discovery, we have the
14 right to conduct some reciprocal discovery back.

13:55:16 15 It's only fair.

16 THE COURT: Well, I need to know, before
17 you do it, what you're proposing.

18 I've ordered 2,000 -- 200 prescriptions per
19 year for 10 years for each defendant, so that's 2,000
13:55:33 20 prescriptions per defendant.

21 Now, presumably, I mean, that could be as
22 many as 2,000 doctors times five defendants, so a
23 thousand doctors.

24 You're not proposing to do a thousand
13:55:50 25 doctor depositions, I wouldn't permit it, and it's not

1 feasible and it wouldn't be relevant.

2 MR. WEINBERGER: Your Honor, can I
3 address -- can I address a couple --

4 THE COURT: I'll just say this.

13:56:01 5 This is what I've ordered. If after these
6 documents are produced you feel, you know, you want to
7 propose some additional discovery, propose it. I'll see
8 what the plaintiffs say and I'll -- then I'll make a
9 decision.

13:56:20 10 MR. DELINSKY: Okay. Thank you, Your
11 Honor.

12 THE COURT: I'm not going to do it in the
13 hypothetical because if you said "I propose to do 2,000
14 doctor depositions," the answer's no.

13:56:33 15 MR. DELINSKY: Okay.

16 THE COURT: Five, I might do that, I might
17 say yes, so I'm not going to make a theoretical ruling.

18 MR. DELINSKY: Okay. Thank you, Your
19 Honor. I understand.

13:56:45 20 MR. WEINBERGER: You know, we can't leave
21 this subject, Your Honor, without our going back many
22 months when we heard the exact same argument in response
23 to a colloquy we had with the Court on what the
24 plaintiffs' theory of the case was in terms of aggregate
13:57:04 25 proof.

1 And we heard, "Well, we need to depose all
2 these doctors." And at the time you, Your Honor, said,
3 "Well, depose whoever you want to depose." And so they
4 issued subpoenas to 50 or 60 doctors in Lake and Trumbull
13:57:26 5 County. Do you know how many of those depositions
6 actually went forward? I think three.

7 So we've heard this same argument time and
8 again in this case. It's all about -- it's all about,
9 you know, this threat that they're going to be prejudiced
13:57:48 10 because they have a limited amount of time before this
11 trial.

12 THE COURT: You know, I'm not going to
13 order, allow thousands of depositions. If they say, you
14 know, we want to do five or six, I may permit that.

13:57:59 15 Okay? I mean, I permitted a limited number
16 before. They noticed 60. They did three. Okay, fine.
17 It ended up being no big deal. It wasn't a big
18 imposition on the lawyers or on the medical community.

19 So I'll let them produce these documents,
20 see what they show, and if the defendants feel that,
21 "Judge, we want to depose some small number of doctors
22 and here's what we propose," I'll let the plaintiffs
23 respond and I'll make a very fast ruling.

24 We'll just do it that way.

13:58:40 25 MR. WEINBERGER: Thank you, Your Honor.

1 THE COURT: All right. You're welcome.
2 I don't think there was anything else,
3 other matters that I needed to address, but I'm quickly
4 looking at it, other than on Page 4 I think I already
13:59:07 5 moved back those deadlines, the May 12th and May 21st.

6 So what are the new deadlines? I think I
7 communicated that to Special Master Cohen. I thought he
8 had communicated it to the parties.

9 MR. WEINBERGER: Yes. Your Honor, my
13:59:21 10 notes, I don't mean to speak for him, but I think we
11 moved the amended complaint deadline to May 19th, and
12 then there was some proposal about a CMO date changing
13 and --

14 THE COURT: Early June.

13:59:37 15 MR. WEINBERGER: Yes, I believe so.

16 THE COURT: Does anyone have that date,
17 just so we are all on the same date? It was one day in
18 the first week of June.

19 MR. WEINBERGER: I apologize, Judge. I
13:59:47 20 don't have that correspondence.

21 MS. FUMERTON: Your Honor, this Tara
22 Fumerton.

23 It's June 3rd.

24 THE COURT: All right. I knew it was one
13:59:56 25 day that first week. So those dates are 5/19 and 6/3.

1 All right. And again, again I would
2 reiterate that I would hope that the pharmacy defendants
3 would consider my offer to at least help the parties
4 explore some potential global resolution.

14:00:28 5 I mean, every other defendant in the case
6 that hasn't gone bankrupt has at least -- is at least
7 exploring it. And I think I'm in the best position to
8 help all sides, and this is largely -- it's largely the
9 PEC. There's -- the state AG involvement with the
14:00:54 10 pharmacies is very limited, I think it's fewer than 10,
11 so that offer remains open.

12 All right. Anything else that anyone wants
13 to bring up?

14 MR. WEINBERGER: Next -- next status
14:01:08 15 conference, Your Honor.

16 THE COURT: I have to set the next status
17 conference.

18 Thank you, Pete. I meant to do that.

19 All right. We've been generally doing them
14:01:17 20 on Wednesdays. We went to Friday because I was in trial
21 so -- well, I was going to go with June 9th but I've got
22 an all-day Court meeting.

23 Well, how is Wednesday, June 2nd?
24 That's -- that's a little quicker, but I can't do it the
14:01:52 25 9th.

1 MR. WEINBERGER: That's fine with us, Your
2 Honor.

3 THE COURT: All right. 1:00 o'clock? That
4 seems as good as any. So let's go 1:00 o'clock on the
14:02:03 5 2nd, and that would mean the status report Tuesday, the
6 1st of June.

7 MR. WEINBERGER: Yes, sir.

8 MR. DELINSKY: Thank you, Judge.

9 THE COURT: Okay. All right. Thanks,
14:02:24 10 everyone.

11 Stay safe, and we'll proceed the way we've
12 talked about.

13 MR. WEINBERGER: Thank you, Judge.

14 THE COURT: All right. Thank you.

14:02:31 15 (Proceedings concluded at 2:02 p.m.)

16 - - - -

17 C E R T I F I C A T E

18 I certify that the foregoing is a correct
19 transcript from the record of proceedings in the
20 above-entitled matter.

21

22 /s/Susan Trischan

23 /S/ Susan Trischan, Official Court Reporter
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